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No. 87-5468

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

SAMUEL BICE JOHNSON,

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent.

CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

BRIEF OF THE MISSISSIPPI PUBLIC DEFENDERS' ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

THOMAS M. FORTNER,
President,
Mississippi Public
Defenders' Association
P.O. Box 998,
Pascagoula, Ms. 39567.
(601) 769-3058.

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MOTION FOR PERMISSION TO FILE BRIEF OF THE MISSISSIPPI PUBLIC DEFENDERS' ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

COMES NOW, Thomas M. Fortner, on behalf of the Mississippi Public Defenders' Association (MPDA), and moves this Court pursuant to U. S. Sup. Ct. R. 36, for permission to file a brief on behalf of the MPDA as Amicus Curiae in support of Petitioner. In support of this motion,

movant states as follows:

1. The MPDA is the official association of the Public Defenders of the State of Mississippi. Members of the MPDA therefore represent a large proportion of the State's indigent criminal defendants.

2. The MPDA believes that a brief would be helpful to this Court to set forth the law of Mississippi as it applied in Mr. Johnson's case. Respondent has taken a contradictory position in another capital case which makes Respondent's current position untenable.

3. Counsel for Petitioner have given written permission for the attached brief. However, counsel for Respondent declined such permission, thereby rendering it necessary for the MPDA to make this motion. U. S. Sup. Ct. R. 36.3.

Wherefore, premises considered, it is hereby moved that permission be granted for the MPDA to file a brief as Amicus Curiae.

Respectfully submitted,
The Mississippi Public
Defenders' Association

/s/ Thomas M. Fortner

THOMAS M. FORTNER,
President,
Mississippi Public
Defenders' Association
P.O. Box 998,
Pascagoula, Ms. 39567.
(601) 769-3058.

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BRIEF OF THE MISSISSIPPI PUBLIC DEFENDERS' ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

The Mississippi Public Defenders' Association (MPDA), is the official association of the Public Defenders of the

State of Mississippi. As such, the members of the association are responsible for much of the representation of indigent criminal defendants in the state. The MPDA feels it appropriate that this Court should be aware of the inconsistencies in Respondent's position on the application of the rule announced in Phillips v. State, 421 So.2d 476, 481-82 (Miss. 1982), to capital cases. While arguing that the rule should not apply in this capital case -- thereby precluding relief -- Respondent has been simultaneously, and successfully, arguing that the rule should apply in another capital case -- thereby precluding relief. Nixon v. State, ___ So.2d ___, DP-65 (Miss. Nov. 25, 1987)(see Appendix A).

Respondent's contradictory arguments have an unfair effect on the MPDA's ability to enforce the constitutional rights of indigent defendants in Mississippi. Therefore the MPDA submits this brief to clarify the law of Mississippi before this Court.

SUMMARY OF ARGUMENT

The MPDA submits this brief as amicus curiae pursuant to Supreme Court Rule 36.4 in support of Samuel Bice Johnson's writ of certiorari to the Supreme Court of Mississippi. Mr. Johnson was convicted of capital murder in the Circuit Court of Pike County, Mississippi, and sentenced to die. The primary evidence introduced in aggravation at the sentencing phase was Mr. Johnson's prior New York conviction for assault in the second degree.

In Mississippi, pursuant to the rule established in Phillips v. State, 421 So.2d 476, 481-82 (Miss. 1982), no attack might be made on a facially valid prior foreign conviction at trial. Rather, the defendant must go to the state where the conviction was entered and seek relief from those courts. If successful, the defendant must subsequently file a motion for post-conviction relief to correct the sentence in Mississippi.

Mr. Johnson followed this procedure, securing relief from the New York Court of Appeals, that state's highest court. People v. Johnson, 69 N.Y.2d 339, 506 N.E.2d 1177, 514 N.Y.S.2d 324 (1987). However, when Mr. Johnson sought relief from his death sentence, the Mississippi Supreme Court created a new rule for the evaluation of prior convictions, and held Mr. Johnson procedurally barred. Johnson v. State, 511 So.2d 1333, 1336-39 (Miss. 1987).

At precisely the time that the Attorney General's Office was arguing that Mr. Johnson should be procedurally defaulted in this case because he did follow the Phillips rule, the Attorney General's Office was arguing that another death-sentenced inmate, John Nixon Sr., should be defaulted because he did not follow the Phillips rule. Indeed, six months after the decision in Mr. Johnson's case, the Mississippi Supreme denied relief to Mr. Nixon for this reason. Nixon v. State, ___ So.2d ___, DP-65 (Miss. Nov. 25, 1985) (see Appendix A).

The MPDA recognizes the State's

interest in establishing procedural rules which ensure the finality of criminal convictions. However, this interest must be fulfilled by giving litigants fair warning of procedural deadlines, and cannot simply result in the unknowing forfeiture of constitutional rights. The 'rule' established by the Mississippi Supreme Court in this case served solely to deprive Mr. Johnson of any opportunity to litigate his constitutional rights, and did not serve to ensure that claims should be timely raised.

STATEMENT OF THE CASE

In 1963, Mr. Johnson was convicted for second degree assault in Rochester, New York. Mr. Johnson was convicted on the basis of a confession which he alleged to have been exacted by coercion, through 12-16 hours of interrogation. He was denied his right to an appeal. For many years he filed diligent pro se petitions raising these issues, in an attempt to secure relief from this conviction. He was turned down at every turn. People v. Johnson, supra.

In 1982, Mr. Johnson was tried in Mississippi for capital murder. He was convicted, and at the sentencing phase the prosecution supplemented the evidence adduced at trial with what purported to be a copy of Mr. Johnson's prior conviction. This evidence was central to the penalty phase, and was argued by he prosecution throughout closing argument. Mr. Johnson was sentenced to die. Johnson v. State, 511 So.2d 1333 (Miss. 1987).

In 1986, Mr. Johnson initiated a proceeding in New York to attack the prior conviction. When the conviction was voided by the New York Court of Appeals, he introduced a certified copy of the vacatur into his motion for post-conviction relief pending before the Mississippi Supreme Court. Upon deciding the motion, however, the Mississippi Supreme Court denied Mr. Johnson relief. Johnson v. State, 511 So.2d at 1336-39.

The Court held, first, that Mr. Johnson was procedurally barred, because "[a]t no time during his direct appeal, or in his petition for certiorari to the U.S. Supreme Court did he argue his New York conviction was constitutionally invalid." Johnson, 511 So.2d at 1337. Alternatively, the Court held that "a foreign state cannot vitiate the death penalty verdict in this state by setting aside a prior conviction of a violent crime through a collateral relief petition." Id. at 1338. The justification for this rule was that otherwise there would exist the "extreme likelihood that a foreign state could overturn the prior conviction through collateral attack." Id.

The three dissenting justices criticized the Court for "tak[ing] a swipe at the New York action suggesting that the Court of Appeals' . . . order should be given less than full faith and credit." Id. at 1343 (Robertson, J., dissenting). They also noted that, "rather than raising the point [of the unconstitutionality of the prior conviction] at the sentencing phase of

the . . . action, the defendant's remedy was a separate post-conviction action which, if successful, would no doubt be the occasion for relief from his sentence . . . . Phillips, 421 So.2d at 483." Id. at 1343.

ARGUMENT

I. RESPONDENT CANNOT ARGUE AGAINST THE APPLICATION OF THE PHILLIPS RULE IN THIS CASE AND IN FAVOR OF ITS APPLICATION IN NIXON, FOR THE SOLE PURPOSE OF PRECLUDING THE FAIR LITIGATION OF CAPITAL DEFENDANTS' CONSTITUTIONAL RIGHTS.

In Johnson v. State, 511 So.2d 1333 (Miss. 1987), Petitioner claimed that the reversal of his prior New York conviction in that state required vacation of his death sentence in Mississippi, which had been predicated upon the earlier conviction. The Supreme Court of Mississippi held that Petitioner "waived this claim, and is procedurally barred. At no time during his direct appeal . . . did he argue his New York conviction was constitutionally invalid." Id. at 1337. This was a radically novel pronouncement on the part of the Court, and -- at the urging of Respondent -- has been subsequently rejected in Nixon. Therefore it cannot be said that the new 'rule' in Johnson was fairly and "clearly announced to defendant and counsel." Henry v. Mississippi, 379 U.S. 443, 448 n.3 (1965).

While the Court in Johnson stated that Petitioner should have raised the issue

prior to his direct appeal, in Phillips v. State, 421 So.2d 476 (Miss. 1982), the Mississippi Supreme Court specifically held that an accused could not litigate this issue prior to post-conviction:

> In fulfilling its mission to determine whether a prior conviction is constitutionally valid for purpose of enhancing a defendant's sentence, the trial court must not be placed in [the] position of 'retrying' the prior case. Certainly any such frontal assault upon the constitutionality of a prior conviction should be conducted in the form of an entirely separate procedure solely concerned with attacking that conviction. This role is neither the function nor the duty of the trial judge in a hearing to determine habitual offender status. Likewise, any such proceeding should be brought in the state in which such conviction occurred, pursuant to that state's established procedures. Should such a proceeding in the foreign state succeed in overturning the conviction, then relief should be sought in Mississippi by petition for writ of error coram nobis.

Id. 421 So.2d at 481-82. Accord Bandy v. State, 495 So.2d 486, 491 (Miss. 1986); Moore v. State, 508 So.2d 666, 669 (Miss. 1987). Attacks on habitual offender status have invariably been entertained on motion

for post-conviction relief. See, e.g., Ellis v. State, 485 So.2d 1062 (Miss. 1986); McLamb v. State, 456 So.2d 743 (Miss. 1984).

The rationale for Phillips[1] is set forth in the opinion, where the Court contrasted the problems inherent in permitting or requiring the accused to attack the validity of the prior foreign conviction in the Mississippi court:

> Witnesses and transcripts must be obtained. A high price in terms of time and money would be exacted from both the state and the defendant. . . . The potential difficulties inherent in [any other] position become readily apparent when viewed in the context of such factors.

Id. 421 So.2d at 480.

The Mississippi Supreme Court's attempt to distinguish the nature of the habitual offender enhancement hearing from the

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1. Of course, the prosecution must produce the records the prior convictions, and while "the trial court is not required to go beyond the face of [the records]" Phillips, 421 So.2d at 481, this is entirely consistent with this Court's determination that the forum state must take note where "the certified records of the [prior foreign] conviction on their face raise a presumption that . . . [the] conviction was void." Burgett v. Texas, 389 U.S. 109, 114 (1967) (emphasis supplied).

capital enhancement proceeding is unconvincing, and could not have been foreseen by the defense bar. See Johnson v. State, 511 So.2d at 1337. To the contrary, in a previous decision the Court had held that Mississippi's "habitual offender sentencing procedures resembles in all relevant respects the sentencing phase of capital crimes." DeBussi v. State, 453 So.2d 1030, 1032-33 (Miss. 1984)(emphasis supplied).

Perhaps the ultimate illustration both of the novelty of the Johnson rule, and the unreasonableness of Respondent's position in this case, appears in the recent decision of Nixon v. State, ___ So.2d ___, DP-65 (Miss. Nov. 25, 1987):

> Here the Court is asked to render guidelines for determining the admissibility of prior felony records to establish aggravating circumstances under Miss. Code Ann. § 99-19-101(5)(b) (Supp. 1986). This Court has announced the . . . procedure in Phillips v. State, 421 So.2d 476 (Miss. 1982).

Id. Slip Op. at 33, Appendix A, at A-2 (emphasis supplied). This ruling came in response to the following argument made by the Attorney General in his brief to the Court, filed at the same time that Petitioner's motion for post-conviction relief was pending:

This Court, in the context of addressing the subject of enhanced punishment pursuant to Mississippi's habitual offender statute, has stated that with respect to the introduction of evidence of a defendant's prior convictions, the prosecution must show and the trial court must determine the following:

(1) the records or the prior convictions must be accurate; and

(2) the records must fulfill the requirement that the defendant sought to be sentenced is indeed the person who was previously convicted.

Phillips v. State, 471 So.2d 476, 581 [sic] (Miss. 1982); accord Bandy, 495 So.2d at 491.

Once these elements have been established, the trial court is not required to go beyond the face of the prior convictions. The trial court is not to be placed in a position of retrying a case. Consequently, the appropriate forum for an attack upon the constitutional validity of a prior conviction is a separate collateral proceeding in the state where the prior conviction occurred pursuant to that state's established procedure. Phillips, 421 So.2d at 481-82; Bandy, 495 So.2d at 491.

See Appendix B, at B-5 (Brief of Respondent, Attorney General of the State of Mississippi, in Nixon v. State, No. DP-65, filed April 29th, 1987)(emphasis supplied). In Nixon, Respondent (represented by at least one of the same counsel as in this case) was still urging this interpretation of Phillips as of January 18, 1988, just one month ago. See Appendix C, at C-1 (Appellee's Response to Petition for Rehearing, in Nixon v. State, No. DP-65, filed Januaary 18th, 1988).

The State cannot argue to this Court that Phillips does not apply here, while simultaneously arguing that Phillips does apply in Nixon, in an effort to uphold both death sentences. Neither can the majority of the Mississippi Supreme Court accept Respondent's arguments, and create two rules, thereby "invoking procedural rules that they do not apply evenhandedly to all similar claims." Hathorn v. Lavorn, 457 U.S. 255, 262 (1982).

CONCLUSION

For these reasons the novel 'rule' announced by the Mississippi Supreme Court appeared without warning to the defense bar, and -- at the behest of Respondent -- is being unfairly applied to Mr. Johnson and to no other litigant in Mississippi. Since the State procedural 'bar' therefore rests on inadequate grounds, this Court should reach the merits of Mr. Johnson's claim.

Respectfully Submitted,
The Mississippi Public
Defenders' Association

By: /s/ Thomas M. Fortner

THOMAS M. FORTNER,
President, M.P.D.A.
P.O. Box 998,
Pascagoula, Ms. 39567.

Appendix A

Excerpts From

JOHN B. NIXON, SR. v. STATE OF MISSISSIPPI

___ So.2d ___, No. DP-65

(Miss. Nov. 25, 1987)

DECIDED: NOV. 25 1987

IN THE SUPREME COURT OF MISSISSIPPI

NO. DP-65

JOHN B. NIXON, SR.

v.

STATE OF MISSISSIPPI

EN BANC:

PRATHER, JUSTICE, FOR THE COURT:

* * *

XV.

During the penalty phase of Nixon's trial, the State sought to introduce as an aggravating circumstance Nixon's prior felony conviction "involving the use or threat of violence to the person." See, Miss. Code Ann. § 99-19-101(5)(b) (Supp. 1986). Defense counsel objected to the introduction of the prior conviction on grounds that the record was not given to the defeendant as part of the aggravating circumstance material 4/ and that the prior

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4 Defense counsel admitted the prior record was tendered to them. They simply argued that the record was not highlighted as being for the purpose of an aggravating circumstance.

record reflected the name "John B. Nixon" instead of "John B. Nixon, Sr." Nixon's objections were overruled.

The prior conviction introduced by the State was a 1958 Texas rape conviction in which Nixon pled guilty and was sentenced to fifteen years in prison. On appeal, Nixon contends the introduction of prior rape conviction was error because (A) the prior conviction was for a non-violent "statutory rape" and (B) the prior conviction was facially invalid.

Initially the State contends these points are procedurally barred because they were not the subject of Nixon's trial objections. Notwithstanding the absence of objetions on the specific points raised on appeal, this Court proceeds to the merits.

* * *

B.

Was the Prior Conviction Facially Invalid?

Here the Court is asked to render guidelines for determining the admissibility of prior felony records to establish aggravating circumstances under Miss. Code Ann. § 99-19-101(5)(b) (Supp. 1986). This Court has announced the following procedure in Phillips v. State, 421 So.2d 476 (Miss. 1982).

In Phillips, the prosecution sought to

use a prior Kentucky conviction to enhance the defendant's punishment under Miss. Code Ann. § 99-19-81, as amended. The defendant objected to the use of the Kentucky conviction alleging that the conviction was invalid because he had not "knowingly and voluntarily" pled guilty. In response to Phillips' argument, this Court held that the trial judge is not required to go beyond the face of prior convictions sought to be used in establishing a defendant's status as an habitual offender. "If, on its face, the conviction makes the proper showing that a defendant's prior plea of guilty was both knowing and voluntary, that conviction may be used for the enhancement of the defendant's punishment under the Mississippi Habitual Offender Act." Phillips, 421 So.2d at 481. See also, Moore v. State, No. 56,885 (Miss. June 3, 1987) (not yet reported).

In the instant case the record reflects that:

> John B. Nixon in open court, in person, pleaded guilty to the charge contained in the indictment, thereupon the said Defendant was admonished by the Court of the consequences of said plea, and the said Defendant persisted in pleading guilty; and it plainly appearing to the Court that the said Defendant is sane, and that he is uninfluenced in making said plea by any consideration of fear, or by any persuasion, or delusive hope of pardon prompting him to confess his

guilt, the said plea of guilty is by the Court received and here not entered of record upon the minutes of the Court as the plea herein of said Defendant.

C.

If the Court had found that the introduction of Nixon's prior rape conviction as an aggravating circumstance was improper, Nixon contends his death sentence must be reversed. This Court has rejected that argument.

Relying on Fant [sic] v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983), this Court has held numerous times that where a death penalty is supported by several aggravating circumstances, the invalidity of one of those circumstances will not constitutionally impair the sentence. See e.g., Stringer v. State, 500 So.2d 928, 945 (Miss. 1986); Irving v. State, 498 So.2d 305, 314 (Miss. 1986).

In the instant case, the jury found two other aggravating circumstances -- (1) the capital offense was committed for pecuniary gain and (2) the capital offense was especially heinous, atrocious and cruel.

* * *

AFFIRMED. WEDNESDAY, DECEMBER 16, 1987, SET FOR EXECUTION OF THE DEATH PENALTY.

Appendix B

Excerpts From

BRIEF OF APPELLEE, STATE OF MISSISSIPPI

JOHN B. NIXON, SR., v. STATE OF MISSISSIPPI

No. DP-65, March 1987 Term

(Filed April 29, 1987)

IN THE SUPREME COURT OF MISSISSIPPI

MARCH 1987 TERM

JOHN B. NIXON, SR. APPELLANT

VERSUS DP- 65

STATE OF MISSISSIPPI APPELLEE

BRIEF OF APPELLEE

* * *

PROPOSITION II.

THE TRIAL COURT PROPERLY ALLOWED THE INTRODUCTION OF APPELLANT'S 1958 GUILTY PLEA INTO EVIDENCE DURING THE PENALTY PHASE OF THE TRIAL

Prior to the initiation of the penalty phase of the trial, counsel for Appellant, during a conference in chambers, objected to the admissibility of Appellant's 1958 Texas conviction for rape on the following grounds: (a) the prior conviction was not given to counsel "as part of aggravating circumstances as ordered in the discovery order"; and (b) "the record does not show John B. Nixon, Sr. [;] [i]t just shows John B. Nixon." (R. Vol. I, 534, 536).

Counsel for Appellant acknowledged they received the prior conviction from the State

in its discovery response. The basis of the objection was that the State failed to "highlight" the fact that the prior conviction would be used as an aggravating circumstance during the penalty phase of the trial. Additionally, Appellee notes that the record of Appellant's prior conviction contained a photograph of him and his fingerprints. Consequently, the records furnished a presumption of his identity which could have been easily overcome if noteworthy. Course v. State, 461 So.2d 771 (Miss. 1984). However, this avenue was not pursued.

During the penalty portion of the trial, when the State moved to offer the prior conviction into evidence, counsel opposite renewed their previous objection. (R.Vol.IV., 540-541). Said motion was duly noted and overruled. [R.Vol.IV, 541].

However, during the hearing on Appellant's motion for new trial, counsel asserted that the prior conviction should not have been admitted because it was over ten (10) years old. Counsel relied upon Rule 609 (b), Mississippi Rules of Evidence.

Appellee notes that none of these theories are asserted here on appeal. Instead, Appellee seeks to attack the validity of the prior conviction on two alternate theories, to wit, the prior conviction is not for a violent felony and it is facially invalid. The recitation of the facts above makes it readily apparent that these theories were not presented to the court below. This Court has held that

an objection may not be made upon one ground in the lower court and be presented upon an entirely different theory on appeal. Anderson v. State, 171 Miss. 41, 156 So. 645, 647 (1934); accord, Daumer v State, 381 So.2d 1014, 1017 (1980). Thus, Appellant having failed to raise the above referenced theories in the court below is procedurally barred from raising the same on appeal.

Assuming, for argument only, these claims were properly preserved for appeal, Appellee submits they are without merit.

The record reflects that on April 9, 1958, Appellant was indicted for the offense of rape. (R.Vol.IV, 549-550). Specifically, the indictment charged that Appellant, having made an assault upon a female under the age of eighteen (18), did ravish and have carnal knowledge of her. [R.Vol.IV, 549].

On May 12, 1958, Appellant in open court pled guilty to the charge in the indictment. Moreover, a jury, having heard the indictment read; Appellant's plea of guilty; and evidence of the charge submitted by the State, found him guilty of the charge of rape and he was duly sentenced to a term of fifteen (15) years imprisonment. (R.Vol.IV, 544-545).

It is a well settled fact of jurisprudence within the state of Texas that "[t]he word "ravish" implies force and want of consent, and its use in the indictment in connection with the allegation of the rape

of a female between the ages of 15 and 18 years, as here, renders the indictment sufficient to support a conviction for rape by force as well as for statutory rape." Rodriquez v. State, 308 S.W.2d 39, 40 (1957) (citation omitted).

Significantly, Appellant, as previously mentioned, did not object to the introduction of this prior conviction on the grounds that it did not involve the use of violence against the person. Surely, if the offense had been committed without the use of force, that fact would have been the most apparent and readily available ground for objection to the introduction of this prior conviction. Appellant fails to point to anything in the record which would indicate that his prior conviction was not for rape by force. This Court has held evidence that a defendant had a prior conviction for rape, a crime of violence to the person, is admissible in the sentencing phase of a capital murder trial. Johnson v. State, 476 So.2d 1195 (Miss. 1985). Appellee notes this Court has, in the absence of a legislative standard, adopted the rationale that a separate standard of determining violence applies when the victim is a child. Bandy v. State, 495 So.2d 486, 492 (Miss. 1986).

Further, there is nothing in the record to indicate that the guilty plea to the rape charge was facially invalid. The record shows that the Appellant, having been advised of the consequences, knowingly and voluntarily pled guilty. [R.Vol.IV, 544,551]. Appellant's bold claim that the

prior conviction is "presumptively" invalid and that the State must, beyond a reasonable doubt, prove its validity is meritless and a blatant misrepresentation of the law.

This Court, in the context of addressing the subject of enhanced punishment pursuant to Mississippi's habitual offender statute, has stated that with respect to the introduction of evidence of a defendant's prior convictions, the prosecution must show and the trial court must determine the following;

> (1) the records of the prior convictions must be accurate; and
>
> (2) the records must fulfill the requirement that the defendant sought to be sentenced is indeed the person who was previously convicted.

Phillips v. State, 471 So.2d 476, 581 (Miss. 1982): accord Bandy, 495 So.2d at 491.

Once these elements have been established, the trial court is not required to go beyond the face of the prior convictions. The trial court is not to be placed in a position of retrying a case. Consequently, the appropriate forum for an attack upon the constitutional validity of a prior conviction is a separate collateral proceeding in the state where the prior conviction occured pursuant to that state's established procedure. Phillips, 421 So.2d at 481-482; Bandy, 495 So.2d at 491.

During the penalty phase of the trial, the prosection affirmatively showed and the trial court duly found that the record of the prior conviction was accurate and that Appellant was the person who had been previously convicted. (R.Vol.IV, 536, 542-553). Accordingly, applying the above referenced rationale, the trial court was not required to go beyond the face of the prior conviction.

Finally, Appellant argues that the introduction of an invalid aggravating circumstance in this case voids the sentence of death. The primary authority urged in support of this claim is Florida case law as interpreted in Barclay v. Florida, 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983). Basically, Appellant argues that Zant v. Stephens, 467 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983), which provides that a death sentence need not be reversed for failure of a single aggravating factor where other valid factors are found to exist, does not apply in states which employ a weighing process (aggravating factors to mitigating factors) precedent to sentence.

This Court has always held that a death sentence may rest upon a single valid statutory aggravating factor. Stringer, 300* So.2d 928 (Miss. 1986), Edwards v. State, 441 So.2d 54 (Miss. 1983), Tokman v. State, 435 So.2d 664 (Miss. 1983), Evans v.

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*. Editor's note: The correct citation is Stringer v. State, 500 So.2d 928 (Miss. 1986).

State, 442 So.2d 737 (Miss. 1982). This court has further held in accord with Zant that where a death sentence "is based on more than one aggravating circumstance, invalidation of one may not invalidate the entire sentence." Irving v. State, 498 So.2d 314 (Miss. 1986); Stringer v. State, supra at 945. The fact that Mississippi law contains a weighing process does not dictate a different result. Irving and Stringer are in full accord with federal precedent. Barclay does not dictate a different result.

In sum, Barclay holds constitutional the Florida system of finding harmless the inclusion of an improper aggravating factor in the absence of any mitigating factors. This holding does not, however, state that such an approach is a necessary component of any capital sentencing scheme which includes the feature of "weighing." Federal courts have so noted. Williams v. Maggio, 679 F.2d 381 (5th Cir. 1982), cert. den. 463 U.S. 1214 (1983); Moore v. Maggio, 740 F.2d 308, 321 (5th Cir. 1984) (rejecting claim that submission of invalid aggravating circumstances "skewed the balance" struck by jury in voting for death); Knighton v. Maggio, 740 F.2d 1344, 1351 (5th Cir. 1984); Watson v. Blackburn, 756 F.2d 1055, 1057-58 (5th Cir. 1984); Martin v. Maggio, 711 F.2d 1273, 1283-84 (5th Cir. 1983), cert. denied ___ U.S. ___, 83 L.Ed.2d 373, 105 S.Ct. 447 (1984). In the wake of Barclay, the United States Supreme Court has dismissed the presence of possible mitigating factors as the pivotal question in reviewing a claim that failure of an aggravating factor automatically skews the weighing process.

In Wainwright v. Goode, 464 U.S. 78, 104 S.Ct. 378, 78 L.Ed.2d 187 (1983), the sentencer (the trial Judge):

> found that three statutory aggravating circumstances had been proved beyond a reasonable doubt. He also found two mitigating circumstances but determined that they did not outweigh the aggravating circumstances.
> (78 L.Ed.2d at 190).

Further interpretation of Goode has resulted in findings that "the existence of mitigating circumstances no longer is of importance" in understanding Barclay. Alford v. Wainwright, 725 F.2d 1282 (11th Cir. 1984).* Alternatively put, the United States Supreme Court in Goode extended its holding in Barclay to cover cases in which the trial judge finds mitigating factors to exist." Alvord, 725 F.2d at 1286, n.4. See also Collins v. Francis, 728 F.2d 1322, 1342 (11th Cir. 1984). Consequently, Barclay as explicated through Goode does not necessitate the absence of mitigating factors as a foundation for upholding a death sentence in the face of a single improper aggravating factor.

In summary, the state contends this question is pretermitted because the

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*. Editor's note: The correct name of the case is Alvord v. Wainwright, 725 F.2d 1282 (11th Cir. 1984).

aggravating factors of pecuniary gain; heinous, atrocious, and cruel; and prior conviction of a violent felony, were properly sumbitted to and found by the jury. Assuming any factor was in any way improper, state and federal law allow the sentence of death to stand.

* * *

Appendix C

Excerpts From

Appellee's Response to Petition
for Rehearing

John B. Nixon, Sr. v. State of Mississippi

___ So.2d ___, No. DP-65

(Filed, 18th January, 1988)

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
SEPTEMBER 1987 TERM

JOHN B. NIXON, SR. — APPELLANT

VERSUS — NO. DP-65

STATE OF MISSISSIPPI — APPELLEE

APPELLEE'S REPONSE TO PETITION FOR REHEARING

* * *

III.

APPELLANT'S 1958 GUILTY PLEA WAS PROPERLY ADMITTED AS PROOF OF A PRIOR CONVICTION OF A VIOLENT FELONY

* * *

Appellant's contention that the 1958 guilty plea was facially invalid is unpersuasive in that it met the guidelines established by this Court in Phillips v. State, 421 So.2d 476 (Miss. 1983) for determining the admissibility of prior felony records to be used to enhance punishment. See also Bandy, supra. Further, pursuant to a long line of cases adopting the rationale enunciated in Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983), even if the introduction of the prior conviction as an aggravating circumstance was improper, it doesn't

warrant the reversal of his sentence of death. See e.g., Stringer v. State, 500 So.2d 928 (Miss. 1986); Irving v. State, 498 So.2d 305 (Miss. 1986); Johnson v. State, DP-43, ___ So.2d ___ (Miss. May 27, 1987) (not yet reported); Faraga v. State, supra.

* * *

Certificate

I hereby certify that I have this day mailed, by Federal Express, a copy of the aforegoing document to the following:

Marvin L. White, Jr.
Assistant Attorney General,
P.O. Box 220,
Jackson, Ms. 39205.

This the 24th day of February, 1988.

/s/ Thomas M. Fortner